LIBRARY
SUPREME COURT U. S.

FILED
JAN 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Number 987

DEWEY LAWRENCE COBB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDDINGTON, KROLL, FRILOUX
& SMITH
C. ANTHONY FRILOUX, JR.
Counsel for Petitioner
2012 South Coast Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

SUBJECT INDEX

	PAGE
CITATIONS OF OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING WRIT	3
CONCLUSION	5
CERTIFICATE OF SERVICE	6
APPENDIX A	7
APPENDIX B	8

LIST OF AUTHORITIES

Cases

Harris v. U. S., 261 F. 2d 897	4
Haywood v. U. S., 268 F. 795	3
Remus v. U. S., 6 Cir., 291 F. 958	4
Roch v. U. S., 271 F. 566 (C.C.A 8)	4
Van Natten v. U. S., C. A. Kan 1966, 357 F. 2d 161	5

United States Statutes

Title 28 U. S. C. A. Sec. 1254 (1)	1
Title 18 U. S. C. Sec. 2312	2
Fed. Rules Crim. Proc. Rule 52 (b), Title 18 U. S. C.	2, 4
28 U. S. C. Section 391 (section 269 of the Judicial Code)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Number .....

DEWEY LAWRENCE COBB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dewey Lawrence Cobb prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 9, 1967, and its denial of Petitioner's motion for re-hearing on December 6, 1967.

CITATIONS OF OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix B hereto, page 8 as yet unreported affirms the convictions and judgments on all counts of the indictment.

JURISDICTION

Judgment of the Court of Appeals was entered on October 9, 1967, page 7 infra. Timely petition for re-hearing was filed on November 13, 1967, and was denied on December 6, 1967. Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

(18 USC 2312) In a prosecution for an alleged violation of Title 18 U.S.C. Section 2312 charging petitioner with interstate transportation of a stolen motor vehicle, the trial resulting thereon raised the following question.

I.

(a) Whether the argument of Government counsel was deliberately inflammatory and improper, rendering defendant's right to a fair trial meaningless?

(b) Whether the District Court's incorrect use of the Fifth Amendment as the basis for defendant's failure to testify was such prejudicial error which any additional instruction would only aggravate rather than cure.

STATUTES INVOLVED

Statutes involved in this cause include Title 18, U.S.C. Section 2312; the Fourteenth Amendment United States Constitution; Rule 52(b) Federal Rules Criminal Procedures, Title 18, U. S. Code. (Cited as Appendix A attached hereto, infra page 7.)

STATEMENT

Petitioner was convicted in the United States District Court for the Southern Judicial District of Texas on an indictment charging a violation of Section 2312, Title 18, United States Code. The case was tried before a jury resulting in a conviction on the single count therein.

The basic question before the jury was whether Defendant knew the car involved was in fact a stolen motor vehicle when it was transported across the state line between Texas and Louisiana.

The government contended petitioner knew the car was stolen; petitioner contends he purchased the car from one George Shava, who later failed to deliver title.

At the conclusion of the evidence and during the argument of the prosecutor, the following remarks were made to the jury:

> "It is your job now to enforce that law if you see fit. If you see fit. If the facts so indicate you can convict this man, this twice convicted car stealer, or if you see fit, you can turn him loose. I don't know about you, but I don't want to rub shoulders with this kind of people. It is your decision. You can now enforce the law or you can forget all about it and go home". (R., P 298, L 9-23).

Petitioner's counsel, whose conduct of the trial exhibited a marked unfamiliarity with the basic evidentiary rules of the forum, had considerable trouble with his interrogation, objections and evidentiary tenders.

REASONS FOR GRANTING THE WRIT

The increasing tendency of the prosecution in Federal Criminal trials to mis-state the relationship of the trial jury to the parties litigant, as in this case, constitutes a practice which materially negates the constitutional guarantee to a fair and impartial trial by a jury of his peers.

Trial Counsel interposed no objection at the time of this inflammatory and prejudicial argument (R. 298, L. 9-23).

Substantial harm resulted from the remarks of the United States Attorney. While it is true that under section 269 of the Judicial Code, as amended, 28 U.S.C. Section 391, not every technical error, defect, or exception which does not affect the substantial rights of the parties, is grounds for reversal, (*Haywood* v. *United States,* 268 F. 795); *Roch* v.

United States, 271 F. 566, (C.C.A. 8) the inquiry however, must always be as to whether in view of the whole record the impression conveyed to the minds of the jurors by irrelevant and prejudicial matter is such that the court may fairly say it has not substantially harmed the defendant.

In addition to being prejudicial and deliberately inflammatory, the statement of the prosecutor was incorrect legally. The statement cited above, of the alleged moral responsibility of the trial jurors was fundamental error. It was not merely an appeal to the civic responsibility of the jurors as law abiding citizens, (*Remus* v. *United States,* 6 Cir., 291 F. 958), but in reality was an argument which placed each juror in the position of being catagorized as breaching his duty and of poor citizenship if the juror found for the defendant.

The prosecution here, went one stop beyond the view allowed in *Harris* v. *United States,* 261 F. 2d 897; in that there is clearly an attempt, and successfully, to place a burden on the individual juror to identify himself with a partisan in the trial, re, the prosecution.

To allow the representative of the sovereign (U.S.) to place the individual juror in the position of convicting the defendant or to be, in the opinion of the United States Attorney, an irresponsible citizen who does not care for justice or law enforcement.

This act by the prosecutor was so destructive of the defendant's right to a fair and impartial jury trial and (including most critically) jury deliberation, that the Supreme Court should consider and then reverse the conviction resulting therefrom.

The petitioner submits the errors complained of were in fact such error as covered by Rule 52(b) of the Federal Rules of Criminal Procedure, Title 18, U.S.C.

Failure to object to such fundamental or planned error should not be grounds for the denial of the relief sought where the error complained of is plain error affecting petitioner's substantial rights. *Van Nattan* v. *United States*, C. A. Kan. 1966, 357 F. 2d 161.

CONCLUSION

Because of the importance of the question of permissive bounds allowed the prosecution in catagorizing the jury's responsibility affects every defendant in future Federal Criminal trials, it is most respectfully submitted that the Court should grant the Writ of Certorari, as requested, considering the question and then define with particularity the permissive bounds past which a zealous prosecutor will not be allowed to exceed.

Respectfully submitted,

EDDINGTON, KROLL, FRILOUX & SMITH

By: .....
C. Anthony Friloux, Jr.

Counsel for Petitioner

2012 South Coast Building
Houston, Texas 77002
CApitol 7-4288

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Morton Susman, United States Attorney, Federal Building, Houston, Texas, and to the Solicitor General, Department of Justice, Washington 25, D.C., postage prepaid, on this the ..... day of ....., 196.....

.....

C. Anthony Friloux, Jr.

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24261

DEWEY LAWRENCE COBB,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(October 9, 1967.)

Before BELL, COLEMAN and GODBOLD, Circuit Judges.

PER CURIAM: This appeal is from a judgment of conviction entered on a jury verdict finding appellant guilty of transporting a stolen motor vehicle in interstate commerce. 18 USCA § 2312. The sole assignment of error is the claim that the prosecutor engaged in prejudicial argument. We hold that the argument was not prejudicial. Moreover, there was no objection to the argument and it did not remotely approach plain error.

AFFIRMED.

APPENDIX "B"

Title 18, U.S.C. Section 2312:

TRANSPORTATION OF STOLEN VEHICLES

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

Rules of Criminal Procedure — Rule 52(b)

PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. U.S.C.A. 1254(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

LIBRARY
SUPREME COURT. U. S

Office-Supreme Court, U.S.
FILED
JAN 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Number 987

DEWEY LAWRENCE COBB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
(SUPPLEMENTAL EXHIBIT — APPENDIX C)

EDDINGTON, KROLL, FRILOUX
& SMITH
C. ANTHONY FRILOUX, JR.
Counsel for Petitioner
2012 South Coast Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24261

D. C. DOCKET No. CR No. 66-H-157

DEWEY LAWRENCE COBB,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before BELL, COLEMAN and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 9, 1967

Issued as Mandate: Oct. 31, 1967
Re-issued as Mandate: Dec. 15, 1967

U. S. Court of Appeals
FILED
Dec. 6, 1967
Edward W. Wadsworth
Clerk

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,261

DEWEY LAWRENCE COBB,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(December 6, 1967)

(On Petition for Rehearing)

Before BELL, COLEMAN, and GODBOLD, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 987

DEWEY LAWRENCE COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1967, and a petition for rehearing was

denied on December 6, 1967. The petition for a writ of certiorari was filed on January 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, despite the lack of objection at trial, petitioner's conviction should be reversed on the ground that the prosecutor's closing argument was prejudicial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on a one-count indictment which charged the unlawful and knowing transportation of a stolen motor vehicle in interstate commerce (18 U.S.C. 2312). On November 9, 1966, he was sentenced to imprisonment for five years.

In mid-November, 1965, a new, recently imported, green, 1965 Volkswagen sedan without license plates was stolen from a service station in Houston, Texas, which was not far from an automotive body repair shop operated by petitioner (R. 26-31, 213). Shortly thereafter, petitioner, who was accompanied by a Mr. Shaver, delivered the Volkswagen to his daughter in Shreveport, Louisiana (R. 76-77, 84, 86-87, 94). The car, at that time, had a Louisiana license plate which was subsequently found to have been issued for a 1955 Dodge (R. 127-128)—a car that had been left for repairs at petitioner's place of business in Texas in November, 1965 (R. 77, 94, 183-184). Petitioner instruct-

ed his daughter to have the car partially re-painted so that it had a white top and a bronze or gold stripe on its side (R. 78, 97-98, 115-116). The daughter never received title to the car (R. 78); petitioner said that he was going to keep the title papers himself and that he wanted to get Texas plates (R. 78, 80, 96).

At the trial petitioner testified that he had purchased the Volkswagen from George Shaver not knowing it was stolen and that Shaver furnished the Louisiana license tags and drove the Volkswagen to Shreveport, while petitioner followed in Shaver's car (R. 165-167, 185). On cross-examination petitioner admitted that he received no papers nor evidence of title, and said that, upon his inquiry, Shaver proferred incorrect Texas title papers for a 1963 Volkswagen, which petitioner rejected (R. 170, 182, 187, 199).[1] Petitioner's reason for having the car repainted was that the distinctive paint would make readily apparent any violation of his instructions to his daughter not to visit undesirable locations (R. 169). On cross-examination of the petitioner, it was brought out that he had previous convictions involving interstate transportation of stolen motor vehicles in 1949 and in 1954 (R. 193).

The defense introduced evidence of petitioner's good character (R. 201, 211, 214), and argued to the jury that petitioner had reformed and at present had a good character (R. 285).

---

[1] Shaver, when called by the defense, indicated, out of the presence of the jury, that he would claim his Fifth Amendment privilege and was excused from testifying (R. 222-228).

In closing argument, after reviewing the evidence, government counsel said (R. 298):

> It is your job now to enforce that law if you see fit. If you see fit. If the facts so indicate you can convict this man, this twice convicted car stealer, or if you see fit, you can turn him loose.
>
> I don't know about you, but I don't want to rub shoulders with this kind of people. It is your decision. You can now enforce the law or you can forget all about it and go home.

No objection to the argument was made at trial.

ARGUMENT

Petitioner argues that the quoted remarks of the prosecutor should have been deemed plain error. The court below properly declined to accept this claim. The reference, in closing argument, to petitioner's previous convictions for similar offenses was founded on evidence introduced after petitioner had taken the stand. Defense counsel had introduced evidence of petitioner's good character (R. 211, 214) and argued that petitioner "had been living right" (R. 285). The prosecution was entitled to argue to the contrary. The rhetoric as to law enforcement amounted to little more than an argument that a person who has been proved guilty ought not be acquitted. See *United States* v. *Hoffa*, 349 F.2d 20, 51 (C.A. 6), affirmed on other grounds, 385 U.S. 293. Certainly, it was not of such extreme character that it would justify reversal in the absence of objection or a request for a corrective instruction.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

FEBRUARY 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 288817 571